Supreme Court, U.S.
FILED
DEC 31 1997
CLERK

No. 97-820

In The Supreme Court of the United States

OCTOBER TERM 1997

JACK P. BRIGMAN,

Petitioner,

v.

CSX TRANSPORTATION, INC.,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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The Petitioner, Jack P. Brigman, ("Brigman") respectfully submits this Reply to Respondent's Brief in Opposition.

I. INTRODUCTION:

Throughout the Brief in Opposition, the respondent has muddled distinct concepts of law. Though often discussed together in this Court's jurisprudence, the issues raised on this appeal are distinct and twofold. First, whether Virginia may guarantee its residents access to its courts and deprive residents of other states this guarantee based solely upon their residency. This question is answered in the negative by the "Comity Clause," U.S. Const. Art. IV, Cl. 2. Second, whether it is permissible for Virginia to dismiss federal causes of action when state causes of action otherwise identical are immune from dismissal. This

question is answered in the negative by the "Supremacy Clause," U.S. Const. Art. VI, Cl. 2.

II. ARGUMENT

A. A State May Not Give Preference to State Causes of Action vis-a-vis similarly situated Federal causes of action.

Among the erroneous contentions asserted by the respondent is that Brigman seeks to reverse this Court's long standing holding that actions brought in state court pursuant to the Federal Employer's Liability Act, 45 U.S.C. §51, *et seq*, are as subject to dismissal or transfer on the basis of forum *non-conveniens* as any other action at law. The respondent agrees that FELA cases carry no immunity from the doctrine of forum *non-conveniens*. However, a state may not discriminate in its application of the doctrine of forum *non-conveniens* to the detriment of federal causes. Such is the case under the statute in question, Va. Code §8.01-265 (Michie 1950), which grants immunity from dismissal to certain state causes of action without extending this immunity to federal causes of action, identical in all ways except their origin in federal law.

1. The application of the forum *non-conveniens* statute in the instant case was neither a neutral nor impartial rule of state procedure directed at Jack Brigman, but one made applicable only because he brought a federal cause of action.

Most of the argument contained in the respondent's brief is a most eloquent example of *Petitio Principii*, a classification of fallacy described by Aristotle well over two thousand years ago. The respondent asserts strenuously that it is well established that a state may apply forum *non-conveniens* to FELA cases, as long as it is done in such a way as not to discriminate against Federal

Causes of Action. This is a premise with which Brigman could not agree more. Wholly absent, however, is an argument of how the Virginia Venue Statute, which immunizes state causes of action for asbestosis from dismissal without extending that same protection to Federal causes of action, is not discriminatory. As pointed out by the Respondent, "[h]ad the legislature intended to favor claims under the [FELA] it certainly knew how to do so." *Brief in Opp.* at 12. Instead, the legislature chose to "favor" state claims in its courts, and exclude federal ones. The Virginia Supreme Court had the opportunity to interpret the statute in such a manner as to extend this protection to federal causes of action such as Brigman's, but refused to do so.[1] *(See Pet. for Writ*, pp. 31a, 37a, 44a-47a.) Thus, the interpretation of the trial court stands as the interpretation of the statute for purposes of this appeal. *See, e.g.*, Garna v. Louisiana, 368 U.S. 157, 166 (1961). As interpreted, FELA claims for asbestosis, where the cause of action accrues under federal statute, 45 U.S.C. §56, are cast out, while state causes of action identical in all respects are immune from dismissal. The only attempted explanation of how such a statute could possibly be described as "non-discriminatory" is a single sentence in respondent's argument, urging that

> "The Virginia statute . . . merely provide [sic] authority to dismiss actions brought by non-residents, under either statute [sic] or federal law, if there is a more convenient forum elsewhere."

Brief in Opp. at 8.

Of course, that is the nature of the doctrine of forum *non-conveniens*, as it was in each of the cases cited by both parties where this Court admonished that such a doctrine must be applied

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[1] Or perhaps, "[t]here is no reasonable reading of the statute that can show that the Virginia General Assembly intended to include FELA cases arising from asbestos exposure with common law personal injury cases arising from asbestos exposure. . ." as argued by respondent (*Brief in Opp.* at 13.) The result, however, is the same.

in such a way as to not discriminate against federal causes of action. This discrimination is, unfortunately, codified in Virginia's Statute as it is now interpreted.

Furthermore, the respondent has chosen to attempt to distinguish this case from Russell v CSX Transportation, Inc., 689 So.2d 1354 (La. 1997), as opposed to urge it was wrongly decided. To urge it was wrongly decided would impliedly admit the need for this appeal.

In Russell, the Court reasoned that "foreign causes of action based on state law must be entertained by Louisiana courts [under the statute] whereas a similar suit based on federal statute may be dismissed . . . with the sole difference being that the latter is based on federal statute." Thus, the Russell Court found the subject statute unconstitutional under the Supremacy Clause. In this case Brigman brought his cause of action for asbestosis under federal law in Virginia's State Court. Had he brought his cause of action under State law, he would be immune from dismissal under the Virginia venue statute. However, he was dismissed because his action was brought under Federal Law. If there exists a conceivable distinction to be made from Russell, it is a distinction without a difference.

B. A State May Not Deprive Litigants of the Right of Access to State Courts Based Solely Upon That Litigant's Residency.

The Respondent is correct that part of Brigman's argument in regard to the Comity clause issue is based upon elimination of a distinction between residency and citizenship for purposes of Privileges and Immunities analysis, as specifically stated in this Court's ruling in United Bldg. and Const. Trades Council of Camden and Vicinity v. Mayor and City of Camden, 465 U.S. 208 (1984)("Camden). Camden did not "impliedly" overrule Douglas v. New York, N.H & H.R. Co. 279 U.S. 387&, it did so with specific reference to Douglas on this issue.

The respondent asserts the "continuing validity" of Douglas and its progeny by claiming that the citation to Douglas in Howlett v. Rose, 496 U.S. 356, 372 (1990) after the Camden ruling reaffirm Douglas' continued application to Comity Clause analysis. Artfully omitted from Respondent's discussion is that the Douglas case concerned two distinct issues, the Comity clause and Supremacy Clause. On the issue of the Supremacy Clause, the Douglas Court held that

> "[the FELA does not purport to require State Courts to entertain suits arising under it . . . [since] there is nothing in the Act of Congress that purports to force a duty upon such Courts as against an otherwise valid excuse." Douglas at 387-88.

It is for this valid proposition that Howlett cites Douglas, as well as other cases. *See* Howlett at 372.

Nor can any comfort for Respondent be found in Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255-56 (1981) which held in part that deference to the plaintiff's choice of forum is stronger when he has brought suit in his home forum. At the risk of arguing the obvious, Piper was a federal case brought in a federal court by citizens of Great Britain. The Court, finding that a more convenient forum existed in Scotland, the residence of the plaintiffs, dismissed the action. The Comity Clause prevents states from discriminating against residents of other states. Absent from Piper were states and residents. The Federal Courts cannot violate the Comity clause and the case has no application to the Privileges and Immunities issue presented herein.

The defendant also cites four cases which it claims petition was sought and denied on Privileges and Immunities grounds though such denials have "no bearing on the merits of the case." *Brief in Opp.* at 10. In fact, in three of those four cases no Privileges and Immunities argument was advanced. In the remaining case, Price v. Atchison, Topeka & Santa Fe Rwy. Co., 268 P.2d 457 (Cal. 1954), the California Court reversed itself

finding that the doctrine of forum *non-conveniens* was available in FELA cases, so long as the State "enforces its policy impartially . . . so as not to involve a discrimination against Employers' Liability Act suits and not to offend against the Privileges and Immunities Clause of the Constitution." Id. at 460. The common law doctrine adopted by California was later codified by the State legislature as discussed in Great N. Rwy. co. v. Superior Court, 90 Cal.Rptr 461 (Cal.App. 1970). The statute provided that

> "When a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just."

Id. at 109-10.

Significantly absent from the California statute is the statutory guarantee of venue to its own residents at the expense of non-residents. Even though the denial of *certiorari* indicates "no view on the merits," it is unsurprising that this Court would find no necessity to review a state statute that does not contain the impermissible lines that Virginia has chosen to draw.

III. CONCLUSION

The Respondent in one aspect is correct, the authority to dismiss FELA claims on the basis of forum *non-conveniens* when the procedure does not run afoul of the Comity Clause or Supremacy Clause is well established. In an effort to set up a "straw man" to knock over, the respondent has urged that Brigman seeks to undermine this holding. However, in fact as opposed to fiction, Brigman challenges the Virginia statute which has cast him from the Commonwealth's Courts solely because he is not a resident of the state, and brings his action under federal instead of state law. The respondent's confusion is understandable, since these two distinct issues are discussed together in this Courts case law, often without great effort to delineate the legal basis behind

the two disparate areas of jurisprudence. It is, in part, this confusion that forms the manifest necessity for this appeal, so that this Court may clarify its previous rulings and provide guidance to the state courts.

Respectfully submitted,

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